

UNITED STATES OF AMERICA,)
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)
) Case No.
) 5:13-CR-00081-H-1
)
 ERWIN ANTONIO RIOS,)
 Defendant.)

SENTENCING HEARING
BEFORE SENIOR JUDGE MALCOLM J. HOWARD
OCTOBER 8, 2013; 1:16 P.M.
GREENVILLE, NORTH CAROLINA

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

DAVID J. COLLIER, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER
413 MIDDLE STREET
NEW BERN, NC 28560

P R O C E E D I N G S

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THE COURT: All right. In the case of Erwin Antonio Rios, let the record reflect Mr. Rios is present with his counsel, Mr. Robert Bell, and counsel for the United States, Mr. Kellhofer --

MR. KELLHOFER: Yes, Your Honor.

THE COURT: -- is present.

This is a sentencing hearing. This Court will follow the dictates of the case of *United States versus Hughes* decided by the Fourth Circuit some years back, which provides that a District Court shall calculate and make the appropriate findings of fact as to the advisory guidelines and then it will consider the advisory guidelines as well as the factors in 3553(a) before imposing a sentence. If the Court were to impose a sentence outside the guideline range then it would state its reasons for doing so.

Now, in accordance with *Hughes* then to establish the guideline range in Mr. Rios' case, Mr. Bell, there were objections to historical matters such as his alias and that he didn't desire to kidnap anyone, but none of that had any impact on the advisory guidelines, did it?

MR. BELL: That's correct, Your Honor. We don't need to be heard on those.

THE COURT: They will remain in the record for

1 Mr. Rios' information, part of the record, but there's no
2 ruling on them and no impact.

3 Mr. Bell, are there any other objections by the
4 defendant, to your knowledge, sir?

5 MR. BELL: No, Your Honor.

6 THE COURT: Mr. U.S. Attorney, does the Government
7 have any objections to the advisory guidelines in this case?

8 MR. BELL: No, Your Honor.

9 THE COURT: Then, announcing them, the total
10 offense level in Mr. Rios' case of possession of a stolen
11 firearm is 29, and the criminal history category is VI, the
12 highest. The guideline range would be 151 to 188 months;
13 however, there's a statutory max of 120, so that would be the
14 new guideline. Probation is precluded. The supervised release
15 term is one to three years. The fine range is 15,000 to
16 150,000, restitution is not an issue, and the special
17 assessment is \$100.

18 Mr. Bell or Mr. Locascio, any objections to those
19 ranges?

20 MR. BELL: No, Your Honor.

21 THE COURT: Mr. U.S. Attorney?

22 MR. KELLHOFER: No, sir.

23 THE COURT: I find that those are correct.

24 All right. Mr. Rios, who is going to do the
25 argument, Mr. Locascio or Mr. Bell?

1 MR. BELL: I will, Your Honor.

2 THE COURT: Mr. Locascio, you all may be seated.

3 MR. LOCASCIO: Thank you, Your Honor.

4 THE COURT: Now, I'm familiar with Mr. Rios to the
5 extent his background is in the presentence report, Mr. Bell.

6 Mr. Rios is 20 years old. He has already accumulated
7 a significant criminal record, which is acknowledged in his
8 status as a VI, the highest level of criminal history.

9 I'm concerned about his posture. I'm concerned about
10 his alleged, I assume, disdain for the United States Government
11 and his loyalty to Islam, his public or otherwise known
12 statements of desire to rob and kidnap military families, rob
13 armored vehicles, detonate bombs, and his statement that it was
14 justifiable to kill a United States soldier all troubles me.

15 What should I do in this case and why? I'm faced
16 with a max of 120 months. Where do we go, Mr. Bell?

17 MR. BELL: Your Honor, as you just stated, there is a
18 statutory maximum of 120 months in this case. We do not have a
19 formal variance or departure argument today for you. We
20 understand his guideline range is significantly higher than the
21 statutory maximum in this case, so we just wanted Your Honor to
22 understand the timeline of the events, that Mr. Rios
23 understands the severity of his crime, he very quickly accepted
24 responsibility for the crime and asked us on his behalf to
25 negotiate a plea deal for him. That's what we did. He came in

1 through a criminal information, so even in the very early
2 stages, before we had significant discovery, he wanted to
3 accept -- plead guilty and accept responsibility and that's
4 what he did, so we wanted the Court to be aware of that.

5 You've got his record in front of you. He is
6 20 years old. I've had a number of conversations with him
7 about what happened here and what he wants to do, you know,
8 going forward in the future. He does not want to spend the
9 rest of his life in prison. He knows that he's going to get
10 out from this and he wants to have a family and really get
11 things back on the right track.

12 He's hopeful that the Court will recommend vocational
13 training. He does have his GED already. He may pursue some
14 educational and vocational opportunities in prison, and then he
15 just wants to be a working member of society going forward when
16 he's released, and that's really all we have.

17 We know your hands are somewhat tied because of the
18 high guideline range and the stat max here, and so we would
19 just ask the Court to impose a sentence within the statutory
20 range as provided.

21 I don't think, Your Honor, that Mr. Rios has a
22 statement for you, unless he's changed his mind, so that will
23 be all from the defense, Your Honor.

24 THE COURT: Thank you, Mr. Bell. You and
25 Mr. Locascio have represented him very professionally.

1 Mr. Rios, I'm required by law to ask you to stand and
2 inquire, do you have any statement that you want to make to me
3 before I pass sentence in your case?

4 THE DEFENDANT: No.

5 THE COURT: All right. Mr. U.S. Attorney, what says
6 the United States?

7 MR. KELLHOFER: Your Honor, it is the Government's
8 position that this individual, Mr. Rios, is in fact -- would be
9 receiving somewhat of a break by the maximum. As you see by
10 the guidelines, 151 months would be appropriate as a starting
11 point, and here the maximum guidelines limit that to 120, so we
12 would believe he's already receiving a great benefit,
13 particularly given the facts of this case, which the Government
14 finds extremely troubling as well.

15 This individual throughout the course of
16 approximately a year spent with confidential human sources
17 expressed his intent without variance or deviance, and it only
18 grew, to the point where the Government did feel a need to act.
19 He was going to move on this. He was intent on obtaining a
20 weapon, he expressed that intent repeatedly, and he expressed
21 exactly why he wanted it. The opportunity was presented for
22 him, based off his desires, to obtain a stolen weapon; notably,
23 a charge that he had previously been convicted of under
24 North Carolina law and was under probation for, possession of a
25 stolen weapon. I won't belabor the point with regard to the

1 intent and his belief and the vitriol that he expressed with
2 regard to the American Government and American soldiers. The
3 probation report does an excellent job of summarizing those
4 facts for you.

5 I would note that, as his counsel has just expressed,
6 he did plead, he did come to the table soon, and that was
7 appreciated, and I think the fact that he is receiving a
8 maximum statutory punishment is something here that he should
9 be very grateful for.

10 Thank you, Your Honor.

11 THE COURT: Thank you.

12 Mr. Rios, you may stand.

13 The Court adopts the findings in the presentence
14 report as credible and reliable and based upon those findings
15 the Court has calculated the imprisonment range prescribed by
16 the advisory guidelines. I've considered that range as well as
17 the other factors set out in 18 U.S. Code 3553(a).

18 Now, pursuant to the Sentencing Reform Act of 1984
19 and in accord with the Supreme Court decision in *United States*
20 *v. Booker*, it is the judgment of the Court that you, Erwin
21 Antonio Rios, are hereby committed to the custody of the Bureau
22 of Prisons to be imprisoned for a term of 120 months.

23 Upon your release you'll be placed on supervised
24 release for a term of three years. Within 72 hours of release
25 you'll report in person to the probation office in the district

1 to which you're released, and while on release you shall not
2 commit another Federal, State or local crime, possess a firearm
3 or destructive device, and you shall comply with the standard
4 and the following additional conditions.

5 Number one, you'll participate as directed in a
6 program approved by your probation officer for the treatment of
7 narcotic drug or alcohol dependency, which will include testing
8 and may require residential treatment.

9 Second, you'll participate in a program of mental
10 health treatment as directed by your probation officer.

11 Third, you'll consent to a warrantless search by a
12 probation officer, or at his request any law enforcement
13 officer, of your person or premises, include anything vehicle.

14 Fourth, you'll participate in a vocational training
15 program as directed by your probation officer.

16 Finally, you'll cooperate in the collection of DNA.

17 It is ordered that you pay the special assessment of
18 \$100, which is due and payable immediately.

19 Although provisions of the Victim and Witness
20 Protection Act are applicable, as there is no identifiable
21 victim in your case, restitution is not an issue.

22 It is ordered that you shall pay to the United States
23 a fine in the amount of \$5,000. The Court finds you without
24 the ability to satisfy a fine within the prescribed range or
25 pay interest; therefore, same is waived. This is due and

1 payable immediately.

2 That concludes the statement of the sentence.

3 Mr. Probation Officer, do you know of any required
4 changes to further comply with the sentencing law?

5 MR. HARDISON: No, Your Honor.

6 THE COURT: Mr. Bell, on behalf of the defendant, are
7 there any remaining legal objections to the sentence as stated
8 by the Court?

9 MR. BELL: No, Your Honor.

10 THE COURT: Mr. U.S. Attorney?

11 MR. KELLHOFER: No, Your Honor.

12 THE COURT: Erwin Antonio Rios, by virtue of the
13 authority duly invested in me, I hereby impose upon you the
14 sentence I have just stated.

15 Now, Mr. Rios, I'm also required to advise you that
16 if you believe your underlying guilty plea was somehow
17 involuntary or there was some other fundamental defect in the
18 proceeding, you may have a right to appeal. If you believe
19 that the sentence I have just imposed is contrary to law, you
20 may have a right to appeal.

21 Now, if there is a basis for appeal, you must file
22 your notice with the Clerk of this Court within 14 days of
23 today's date. I direct Mr. Bell and/or Mr. Locascio to advise
24 you of these matters and then if there is a basis for appeal,
25 to assist you in filing the notice, and after that it would be

1 up to the Circuit Court to determine whom your appellate
2 counsel would be.

3 I wish you good luck. That concludes your sentencing
4 hearing.

5 Marshal, you may take Mr. Rios in your custody.

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7 (Proceedings concluded at 1:28 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a sentencing hearing in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this 10th day of April, 2017.

/S/ DAVID J. COLLIER

DAVID J. COLLIER

OFFICIAL COURT REPORTER